

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Qualcomm Incorporated	)	WT Docket No. 05-7
Petition for Declaratory Ruling	)	
	)	

To: Office of the Secretary  
Attn: Wireless Telecommunications Bureau,  
Mobility Division

**COMMENTS OF COX BROADCASTING, INC.**

Cox Broadcasting, Inc. ("Cox"), by its attorneys, hereby submit these comments in response to the Petition for Declaratory Ruling ("Petition") of Qualcomm Incorporated ("Qualcomm").<sup>1</sup> Television Station KTVU(TV), Oakland, California, licensed to an affiliate of Cox, operates DTV facilities on Channel 56 in the so-called "Lower 700 MHz Band" where Qualcomm holds licenses as a new entrant. Qualcomm accepted those licenses with the irrefutable understanding that new entrants like itself could commence operations prior to the end of broadcast service in the Lower 700 MHz Band if they either "fully protected" incumbent broadcast television stations or obtained their concurrence. Qualcomm's Petition seeks to alter this reasonable balance that the Commission established by obtaining grant of three interrelated proposals: (1) permitting the use of OET-69 to demonstrate compliance;<sup>2</sup> (2) defining "compliance" as allowing interference to 2% of a television station's service area population; and (3) shifting the burden to broadcasters, within fourteen days of notice, to prove that new entrant operations are not in compliance.

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<sup>1</sup> "Pleading Cycle Established for Qualcomm Incorporated Petition for Declaratory Ruling," *Public Notice*, DA 05-87 (Jan. 18, 2005). The comment date subsequently was extended to March 10, 2005. *See* Qualcomm Incorporated Petition for Declaratory Ruling, *Order*, DA 05-419 (rel. Feb. 15, 2005).

<sup>2</sup> OET-69 is a computer-based engineering methodology the Commission developed for evaluating TV coverage and interference using field strength predictions at specific geographic points while accounting for terrain.

Qualcomm is a beneficiary of the Commission's efforts to maximize spectral efficiency and usage intensity in managing the DTV transition, but there are clear limits to what the Commission can do to extend further benefits to new Lower 700 MHz entrants. The Commission has no discretion to entertain the relief Qualcomm seeks, and, even if the Commission could grant the proposals, the trade-off would be unjustified. Broadcast television stations such as KTVU-DT offer invaluable services to their communities that should not be sacrificed to achieve the speculative benefits promoted by Qualcomm. The Commission's Rules already specify the regulatory decree needed to accommodate Qualcomm's aspirations: obtain broadcaster concurrence.

**I. QUALCOMM MUST "FULLY PROTECT" LOWER 700 MHz INCUMBENT BROADCAST STATIONS, AS ALL HAVE KNOWN FOR A LONG TIME.**

Throughout the Commission's initiative to transition broadcast television stations to digital, it deliberately has sought to avoid disenfranchising television viewers.<sup>3</sup> The Commission attempted, in assigning paired channels to each television station, to ensure that viewers receiving a station's analog service could receive the digital signal as well.<sup>4</sup> As a part of this transition, the Commission recognized, given the spectral efficiency of DTV operations, that it ultimately could reduce the amount of spectrum dedicated to over-the-air television service.<sup>5</sup> Once analog television service ceased, broadcasters could be "repacked" into a smaller "core" spectrum of Channels 2-51, but until that time out-of-core broadcast operations were to be protected.<sup>6</sup>

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<sup>3</sup> See, e.g., *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Fifth Report and Order*, 12 FCC Rcd 12809, ¶ 4 (1997) ("*DTV Fifth R&O*").

<sup>4</sup> See, e.g., *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Sixth Report and Order*, 12 FCC Rcd 14588, ¶¶ 29-33 (1997) ("*DTV Sixth R&O*"). The policy remains in effect today. As recently as last month the Media Bureau refused to countenance the loss of 0.25% of a station's measured over-the-air service population for the sake of eliminating a paired allotment. See Letter from W. Kenneth Ferree, Media Bureau Chief, *Federal Communications Commission*, to Barry A. Friedman, Counsel, *KJLA, LLC*, DA 05-343 (Feb. 9, 2005).

<sup>5</sup> See, e.g., *DTV Sixth R&O*, ¶¶ 34, 76-84; see also 47 U.S.C. 336(c).

<sup>6</sup> See *DTV Sixth R&O*, ¶ 83.

Also as a part of the DTV initiative, the Commission identified Channels 60-69 (the “Upper 700 MHz Band”) for prompt reallocation to non-broadcast services once analog television service ended because the band was lightly encumbered.<sup>7</sup> The Commission anticipated that actual reallocation of Channels 52-59 (the “Lower 700 MHz Band”) would take longer given the extensive and intensive use of the band by broadcasters.<sup>8</sup> Congress took action by establishing deadlines for auctioning the Upper and Lower 700 MHz Bands to new entrants and ensuring that portions of the reallocated Upper 700 MHz Band, where entrants could commence service more promptly, was allocated to public safety services.<sup>9</sup> The Commission in response auctioned the Lower 700 MHz Band before the end of the DTV transition (*i.e.*, before incumbent broadcast operations are cleared).

As a condition of that auction, the Commission made a very simple deal with Qualcomm and other Lower 700 MHz bidders:

New licensees may operate in the band prior to the end of the transition, provided they do not interfere with existing analog and digital broadcasters.<sup>10</sup>

Throughout its proceedings to reallocate the Lower 700 MHz Band, the Commission was very clear that it would protect incumbent broadcast operations:

[A]ll existing analog TV and new DTV stations in the [Lower 700] MHz band would be *fully protected* during the DTV transition period. Thus, it will be necessary for licensees in the reallocated spectrum to protect both analog TV and DTV stations in the [Lower 700] MHz band from interference.<sup>11</sup>

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<sup>7</sup> *Id.* ¶¶ 79-80.

<sup>8</sup> *See, e.g.*, Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, 17 FCC Rcd 1022, ¶¶ 37-38 (2002) (“*Lower 700 MHz R&O*”).

<sup>9</sup> *See id.* ¶ 4 for discussion.

<sup>10</sup> *Id.* ¶ 6.

<sup>11</sup> Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Notice of Proposed Rule Making*, 16 FCC Rcd 7278, ¶ 29 (2001) (“*Lower 700 MHz NPRM*”) (emphasis added) (citation omitted).

The Commission accordingly adopted a “conservative approach” that it concluded was warranted by the “number and density of incumbent TV stations in the Lower 700 MHz Band.”<sup>12</sup> The Commission said a “major factor” in adopting heightened standards and prohibiting interference to viewers in the Lower 700 MHz Band was the lack of public safety operations.<sup>13</sup> The Commission emphasized that:

The degree of incumbency in this band also underscores the importance of adopting rules that insure that new licensees provide adequate protection to incumbent broadcasters. We emphasize that ***we have an obligation to fully protect incumbent full-power analog and digital broadcasters*** during the transition period, and adopt rules that support this ***core value***.<sup>14</sup>

Before Qualcomm accepted its Lower 700 MHz licenses, the Commission repeatedly and emphatically reminded Qualcomm of this protection standard and its uncertain duration.<sup>15</sup> The Commission created a single exception: it would waive the full protection if the new entrant obtained the “written concurrence” of the television station affected.<sup>16</sup> Consistent with this exception, the Commission also provided that new entrants could enter into voluntary clearing arrangements with incumbent broadcast stations that would eliminate Lower 700 MHz television service to a station’s viewers.<sup>17</sup> Accordingly, only where the broadcast television station explicitly consented would the Commission deviate from its “core value” of full protection of Lower 700 MHz television viewers – protection which the Commission said for stations such as KTVU-

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<sup>12</sup> *Lower 700 MHz R&O*, ¶ 55-56.

<sup>13</sup> In contrast to the Upper 700 MHz Band. *See id.*

<sup>14</sup> *Id.* ¶ 38 (emphasis added).

<sup>15</sup> *See, e.g., Lower 700 MHz NPRM*, ¶¶ 2,7, 20; *Lower 700 MHz R&O*, ¶ 38; “Due Diligence Announcement for the Upcoming Auction of Licenses in the Lower 700 MHz Band,” *Public Notice*, DA 03-845 (Mar. 21, 2003).

<sup>16</sup> 47 C.F.R. § 27.60(b)(1)(iv).

<sup>17</sup> *Lower 700 MHz R&O*, ¶184.

DT constituted a “reasonable balance between the needs of both DTV stations and new services.”<sup>18</sup>

## **II. THE COMMISSION IS NOT FREE TO GRANT QUALCOMM’S REQUESTED RELIEF.**

Qualcomm has submitted a package of proposals – fashioned as a petition for a declaratory ruling – that would permit extensive interference to broadcast television stations without their consent or compensation to them. Qualcomm proposes in the Petition that the Commission allow the use of OET-69 to calculate a permissible interference to 2% of an incumbent television station’s service area population and place the burden on incumbents to prove otherwise quickly.

The Commission is not free to grant these intertwined proposals and should deny Qualcomm’s Petition promptly. Essentially, Qualcomm seeks a declaration that the Commission will eliminate full interference protection to incumbent broadcast stations. This is a request for a substantive change in the existing rules, not a request for a declaration regarding their interpretation. The Petition hence is procedurally defective because it amounts to no more than a late-filed petition for reconsideration of the *Lower 700 MHz R&O*’s amendment of Section 27.60 of the Commission’s Rules. Qualcomm had ample opportunity during the creation of the incumbent protection standards to make the proposals set forth in the Petition, but no party – including Qualcomm – opposed the provision of full protection to Lower 700 MHz Band television stations.<sup>19</sup> The Petition merely is an untimely and impermissible petition for reconsideration of incumbent protection standards which the Commission’s precedents simply do not allow.

Nor should the Commission regard Qualcomm’s filing as a petition for waiver of Section 27.60(b)(1)(iv)’s requirement that incumbent broadcasters must consent to any interference received by viewers – the Commission is not free to grant that type of relief either.

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<sup>18</sup> *Lower 700 MHz NPRM*, ¶ 31.

<sup>19</sup> *Lower 700 MHz R&O*, ¶ 52.

Congress already has prohibited the Commission from entertaining similar waiver requests, except to facilitate the provision of public safety services which Qualcomm does not pretend to offer. In the Auction Reform Act of 2002, Congress prohibited the grant of “interference waivers” to help new licensees such as Qualcomm introduce their services if the waiver would cause interference to television stations.<sup>20</sup> Congress specifically was concerned about moving 700 MHz television stations into the core without the consent of other stations that might receive new interference. Congress made plain that it would not tolerate interference to television stations without their consent, except to help public safety services.<sup>21</sup>

While Congress’s concern about unjustified interference to existing television stations plainly is paramount, Congress also was aware of worries aired both by the wireless and broadcast industries about unjust enrichment for supplanting incumbent broadcast services and acted to ensure that parties get what they bargain for.<sup>22</sup> Qualcomm, of course, had ample notice of the incumbent protection requirements before it ever bid on the Lower 700 MHz spectrum, but it now seeks permission to cause interference contrary to Congress’s concerns about unjust enrichment. The Commission might as well demand that broadcasters subsidize Qualcomm’s MediaFLO roll-out. Congress never could have intended such a challenge to its notions of spectrum integrity and equity. Changes of the magnitude proposed by Qualcomm impermissibly would tilt the reasonable Lower 700 MHz balance. Qualcomm has no procedural vehicle – whether a petition for declaratory ruling, petition for reconsideration, or request for waiver – that would give the Commission any room to act on its proposals.

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<sup>20</sup> Auction Reform Act of 2002, Pub. L. No. 107-195, 116 Stat. 715, § 6 (“Auction Reform Act”).

<sup>21</sup> *See id.* § 6(b).

<sup>22</sup> *Id.* § 2(6)(B).

### III. QUALCOMM'S PUBLIC INTEREST ARGUMENTS ARE FLAWED AND INADEQUATE.

Even if the Commission were free to act on Qualcomm's Petition, it should not do so. Qualcomm seeks to overcome the Petition's deficiencies by claiming a number of unreasonable public interest benefits that might justify grant of the interrelated proposals. Foremost, Qualcomm generally contends that the relief it seeks is justified because the proposed interference that would result from grant of its proposals is temporary and minimal. The Commission should disregard these arguments in their entirety. First, regarding the "temporary" aspect of Qualcomm's argument, Congress and the Commission adopted their 700 MHz statutes and regulations with the clear understanding that full protection of television viewers in this band necessarily was temporary. At some point, analog television service ends and the Commission will clear broadcast stations from the 700 MHz Band. Qualcomm unreasonably seeks at this stage to justify changes to temporary protection rules on the grounds that they are...*temporary*. Congress and the Commission already have calculated a reasonable policy balance predicated upon the inherent temporality. Only if the 700 MHz encumbrances were permanent would Qualcomm's argument begin to have a logical basis.

Ironically, Qualcomm's proposed temporary interference – supposedly justified by its temporary nature – actually would tend to extend the duration of the interference. Congress mandated that the 700 MHz band could not be cleared of incumbent broadcast service until 85% of viewers in a market essentially were capable of receiving a digital signal.<sup>23</sup> Qualcomm's proposals necessarily would decrease market penetration by causing viewer interference, thereby extending the DTV transition and the period of incumbent operation on the Lower 700 MHz Band.

Qualcomm attempts to circumvent this effect on the DTV transition by stressing the "minimal" nature of the impact. Qualcomm maintains that fewer viewers actually would receive interference than would be predicted, citing studies in the Phoenix, New Orleans, and Oklahoma

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<sup>23</sup> See 47 U.S.C. § 309(j)(14)(B).

City markets.<sup>24</sup> Notably absent, however, are studies in larger markets, such as the San Francisco DMA (ranked fifth) served by Cox station KTVU(TV).

The Commission should not be misled into believing that the proposed interference somehow is an insignificant quantity or that new entrants would not exploit the amount to the extent permitted. First of all, as detailed in the attached Technical Exhibit, the reliability of OET-69 to predict this interference accurately is questionable. For example, OET-69 does not account for atmospheric variability and man-made obstructions prevalent in the San Francisco Bay area.<sup>25</sup> Second, despite the presence of such complicating factors, Qualcomm would have stations such as KTVU-DT prove with only two-week's notice the existence of particular flaws of specific Qualcomm proposals. Third, it is plain that Qualcomm fully would avail itself of the proposed 2% interference in the San Francisco market, where it has sought Cox's consent for much more interference. As the attached technical exhibit notes, grant of Qualcomm's proposals would cause interference to 112,000 viewers in the KTVU-DT service area, likely in locations where over-the-air reliance is the highest.<sup>26</sup> Qualcomm's contention that most viewers rely on MVPD services has little merit. The Commission made very clear last month that stations will not obtain must-carry rights for their digital signals until the DTV transition ends and Qualcomm's encumbrances are removed.<sup>27</sup> Regardless of MVPD subscription rates, viewers only will have guaranteed access to DTV signals *via* over-the-air.

Despite the magnitude of the proposed interference, Qualcomm claims its proposals nonetheless are justified because the amount is *de minimis* by DTV standards.<sup>28</sup> This suggestion,

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<sup>24</sup> Petition at 17.

<sup>25</sup> Technical Exhibit at 3. Other short-comings of using OET-69 in the manner proposed are specified as well.

<sup>26</sup> *Id.* The technical exhibit analyzes Qualcomm's impact on KTVU-DT in detail.

<sup>27</sup> Carriage of Digital Television Broadcast Signals, *Second Report and Order and First Order on Reconsideration*, CS Docket No. 98-120, FCC 05-27, ¶ 27 (rel. Feb. 23, 2005).

<sup>28</sup> The *de minimis* DTV interference standard is set forth in 47 C.F.R. § 73.623(c)(2).



however, ignores the reasons why the Commission adopted this particular DTV standard in the first place. None of those reasons are present here. First, the Commission adopted a 2% *de minimis* standard because the amount of television spectrum is insufficient to permit interference-free operation during the DTV transition.<sup>29</sup> Qualcomm, on the other hand, was aware that it might have insufficient spectrum to provide interference-free services when it bid. Second, the Commission sought to address legacy elements through the *de minimis* standard of the traditional service area discrepancy between VHF and UHF stations.<sup>30</sup> No comparable service discrepancy exists for Qualcomm. Third, by permitting 2% interference, the Commission was attempting to achieve a fundamental policy goal of preserving existing service.<sup>31</sup> Qualcomm is proposing a new service upon which no one relies. Last, the DTV *de minimis* standard was understood to be balanced and reciprocal for television stations. Qualcomm does not propose that broadcasters could reciprocally cause 2% interference to its service area. In fact, broadcasters in the band are prohibited from expanding their service area, so they could not encroach upon Qualcomm's service areas even if they wanted.<sup>32</sup>

Lastly, Qualcomm lists a number of benefits of the MediaFLO product that consumers could receive in exchange for losing broadcast service. Whatever the speculative merits of the new product, they undoubtedly pale in comparison to those offered by broadcast stations such as KTVU-DT. The station is a long-standing, participating citizen of the Bay area and is proud to contribute to the well-being of the community. Many local citizens rely on KTVU as their primary source of local and national news, and the station airs six hours of local news

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<sup>29</sup> *Sixth DTV R&O*, ¶¶ 12, 29-33.

<sup>30</sup> Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, 13 FCC Rcd 7418, ¶¶ 78-70, 85 (1998).

<sup>31</sup> *Id.* ¶ 59.

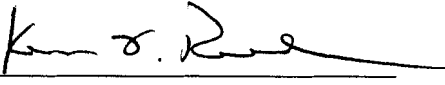
<sup>32</sup> See "Freeze on the Filing of TV and DTV "Maximization" Applications in Channels 52-59," *Public Notice*, 17 FCC Rcd 11290 (June 18, 2002); see also "Freeze on the Filing of Certain TV and DTV Requests for Allotment or Service Area Changes," *Public Notice*, DA 04-2446 (Aug. 3, 2004)

programming every weekday. When natural disasters and other emergencies arise, community members invariably look first for critical information from KTVU and other local broadcasters, who serve as an indispensable link in the public safety system. KTVU also serves as a primary source of political information to the local community.<sup>33</sup>

#### **IV. CONCLUSION**

Cox believes Qualcomm shares the view that the DTV transition should end as soon as technologically possible, which would clear the way for unencumbered operations in the Lower 700 MHz Band. Qualcomm's interrelated proposals, however, would extend the period of encumbrance and, in the process, impermissibly shift the reasonable balance that exists between new entrants and incumbent broadcasters. Not only would incumbent television stations be subject to receiving new interference without their consent, but they would have the burden, on a case-by-case basis, to prove non-compliance in rapid fashion. The Commission has no discretion to grant relief of this nature; the speculative benefits cited by Qualcomm are far outweighed by the community costs resulting from diminished over-the-air television service. The Commission accordingly should dismiss the Qualcomm proposals without further consideration.

Respectfully submitted,  
**COX BROADCASTING, INC.**

By:   
Kevin F. Reed  
Scott S. Patrick

**DOW, LOHNES & ALBERTSON, PLLC**  
1200 New Hampshire Avenue, NW  
Suite 800  
Washington, DC 20036  
(202) 776-2000  
Its Attorneys  
Dated: March 10, 2005

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<sup>33</sup> The station's excellence in this regard recently was recognized by the USC Annenberg Walter Cronkite Award for Excellence in Television Political Journalism.

**CERTIFICATE OF SERVICE**

I, Rayya Khalaf, a secretary at the law firm of Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 10th day of March 2005, I caused a copy of the foregoing Comments of Cox Broadcasting, Inc. to be served on the following via U.S. Mail:

Dean R. Brenner  
QUALCOMM Incorporated  
2001 Pennsylvania Avenue, N.W.  
Washington, DC 20006

  
Rayya Khalaf